I am also of the view that any argument based on confirming houses and the cases cited by the plaintiff on the position of confirming houses in relation to principals abroad has little or no relevance here because the defendants were not acting as a "confirming house" nor were they acting for any seller in Singapore.

For all these reasons, I would dismiss the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *Yap & Yap; Mallal & Namazie.*

MALAYSIAN REPORTS

UNITED MALAYAN BANKING CORPORATION BHD. v. LIEW YONG

[A.C.J. (Wan Hamzah J.) March 22, 1974]
[Ipoh — Civil Suit No. 56 of 1973]

Banking — Cheque drawn in excess of amount standing to credit of customer — Cheque honoured by bank — Customer deemed to request loan from bank — Bank giving loan to customer.

In this case the plaintiff issued a specially indorsed writ claiming the sum of $18,472.89 being the debit balance of the defendant's bank account with them. The plaintiff applied for leave to sign final judgment. The defendant alleged that there was no agreement at any time between him and the plaintiff whereby the plaintiff would lend him money nor did he ever request the plaintiff for a loan. He alleged that the plaintiff acted negligently and without his authority in debiting his account. The defendant had issued a cheque for an amount exceeding the amount standing to his credit and this had been honoured by the plaintiff. The Senior Assistant Registrar had dismissed the application of the plaintiff and given leave to the defendant to defend the action. The plaintiff appealed.

Held, allowing the appeal: the defendant in drawing the cheque in excess of the true amount standing to his credit was in fact requesting a loan from the plaintiff and in honouring that cheque the plaintiff was in fact giving a loan to the defendant. Therefore on the undisputed facts, the defendant had no defence to the claim and judgment must therefore be given for the plaintiff.

Cases referred to:-

(1) *Cuthbert* v. *Robarts, Lubbock & Co.* [1909] 2 Ch. 226, 233.

(2) *Cunliffe Brooks & Co.* v. *The Blackburn and District Benefit Building Society* (1883-4) 9 App. Cas. 857, 864.

(3) *Gordon* v. *London, City and Midland Bank, Gordon* v. *Capital and Counties Bank Ltd.* [1902] 1 K.B. 242, 283.

CIVIL SUIT.

Yeap Eng Kooi for the plaintiff.

W. E. Balasingam for the defendant.

Wan Hamzah J.: The plaintiff's claim in his specially indorsed writ is for a sum of $18,472.89 being balance of the defendant's banking account as at 14 February 1973, and interest thereon at 12% per annum from 15 February 1973 to date of judgment and at 6% per annum thereafter to date of realisation. The basis of the claim as stated in the Statement of Claim is that the sum is "money payable by the defendant to the plaintiff for money lent to the defendant and for money paid to the defendant by the plaintiff's Ipoh branch as banker for the defendant at his request and for interest upon money due from the defendant to the plaintiff currently at the rate of 12% per annum with monthly rests and foreborne at interest by the plaintiff to the defendant at his request and for bank charges."

The plaintiff applied in Chambers for leave to sign final judgment. The defendant opposed the application, and the Senior Assistant Registrar dismissed the application and granted the defendant unconditional leave to defend. The plaintiff appeals against the Senior Assistant Registrar's decision.

The following facts stated in this paragraph are not disputed by the parties. On 14 December 1972 the defendant requested the plaintiff to open a current

account with the plaintiff bank in his name. In the form of application to open the account, which the defendant signed, the following paragraph appears:

"I request and authorise you to pay all cheques purporting to be drawn by me on the said account and you are to debit all cheques so drawn to the said account whether the same is in credit or otherwise, it being understood that in the absence of any special arrangement you are not to be bound to honour any cheque if the said account is not sufficiently in credit to meet it."

Account No. 5036 in the name of the defendant was opened. On 9 January 1973 the defendant had a credit balance of $589 in his account. On 10 January 1973 he presented for payment into his account a cheque for $19,325 drawn on the Southern Banking Berhad, which cheque was credited to his account before clearance. As the result of this the defendant's account showed a credit balance of $19,914. On the same day the Southern Banking Berhad presented for payment a cheque for $19,300, drawn by the defendant on the plaintiff bank which cheque was honoured. As the result, at the close of 10 January 1973 the defendant's account in the plaintiff bank showed a credit balance of $614. However, on 11 January 1973 the Southern Banking Berhad returned to the plaintiff bank the said cheque for $19,325 as being dishonoured. So the plaintiff bank debited the defendant's account with the said sum of $19,325. On 11 January 1973 the defendant presented for credit of his account two cheques, one for $10,530 and the other for $10,000. These two cheques were credited to his account before clearance, and as the result that account showed a credit balance of $1,819 at the close of 11 January 1973. Bank charges of $5 and 75 cents respectively were debited and the credit was thus reduced to $1,813.25. On 12 January 1973 the Southern Banking Berhad returned to the plaintiff bank the said two cheques of $10,530 and $10,000 respectively as being dishonoured. Therefore the plaintiff bank debited the defendant's account with a sum equal to the amounts of the said two cheques, and as a result of this the defendant's account showed a debit balance of $18,716.75 at the close of 12 January 1973. At the end of January 1973 the plaintiff charged an interest of $56.14 on the defendant's account, and on 8 February 1973 there was payment into the account of a sum of $300. As a result the account showed a debit balance of $18,472.89 as at 14 February 1973.

The defendant opposed the plaintiff's application (for leave to sign final judgment) on the ground that there are triable issues. He alleged that there was no agreement at any time between him and the plaintiff whereby the plaintiff would lend money to him nor did he ever request the plaintiff for loan. He alleged that he was not educated in English and was unable to read or write English. He alleged that when he was opening the account with the plaintiff bank and was requested to sign documents the plaintiff's staff explained to him merely that the documents were specimen signature documents. He alleged that the documents were not interpreted to him in Chinese. In other words, the defendant alleged that he did not know the terms contained in the application form to open account which he signed. The defendant further alleged that the plaintiff acted negligently and without his authority in debiting his account with the sum of $18,472.89.

Even if it were true that the defendant was not aware of the terms contained in the application form and consequently there was no valid prior agreement for loan, the defendant by his conduct subsequent to the opening of the account has nevertheless put himself in the position of a borrower. On 10 January 1973 when his credit balance with the plaintiff bank stood at $589 he presented for payment into that account a cheque for $19,325 which was dishonoured on 11 January 1973. Before this cheque was returned dishonoured the defendant had drawn a cheque on the plaintiff bank for $19,300 on 10 January 1973, which cheque was honoured, as the result of which the defendant had overdrawn to the extent of $18,716.75 at the close of 12 January 1973. In my opinion, on drawing the cheque for $19,300 on the plaintiff bank the defendant was in fact requesting for a loan. Probably there have been decided cases identical to the present case, but so far I have not been able to trace one. However, I feel fortified in the view which I have taken by certain passages appearing in the judgments in the following decided cases although the facts therein are not on all fours with the present case. In *Cuthbert* v. *Robarts, Lubbock & Co.*,[1] the following passage appears in the judgment of Cozens-Hardy M.R.: —

"If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."

In *Cunliffe Brooks & Co.* v. *The Blackburn and District Benefit Building Society*,[2] Blackburn L.J. stated —

"In all banking accounts the bankers, so long as the balance of the account is in favour of the customer, are bound to pay cheques properly drawn, and are justified, without any inquiry as to the purpose for which those cheques were drawn, in paying them. But they are under no obligation to honour cheques which exceed the amount of the balance, or, in other words, to allow the customer to overdraw. Bankers generally do accommodate their customers by allowing such overdrafts to some extent; when they do so the legal effect is that they lend the surplus to the customer...."

In *Gordon* v. *London City and Midland Bank Ltd.*, *Gordon* v. *Capital And Counties Bank Ltd.*,[3] Mathew L.J. observed —

"...one can well understand why it should be desirable for banks on the one hand, willing to have accounts opened with them by traders in a small way of business in different parts of the country, and for such traders on the other hand, that the bank should in such cases treat cheques as cash as soon as received without waiting till they are cleared. Accordingly it appears that in the case of these cheques, and in the case of country banks generally, the course is taken of at once crediting the customer with the amount of the cheque, and afterwards proceeding to clear the cheque. No doubt in such a case the cheques are received on the terms that the amount shall be credited in account, and that, if the cheque is subsequently dishonoured, the customer may be debited with the amount of it...."

Since the defendant in the present case drew the cheque of $19,300, in excess of the true amount which ought to be standing to the credit of his account, I hold that in doing so the defendant was in fact requesting the plaintiff for a loan, and in honouring that cheque the plaintiff was in fact giving a loan of money to the defendant. Therefore I hold that that on the undisputed facts in this case the defendant has no defence to the claim. As regards the rate of the interest charged by the plaintiff and the manner in which the interest was calculated, there is nothing on the record to suggest

that these were not in accordance with the custom and usage of banks charging interests in similar cases.

Counsel for the plaintiff referred to the bank statements exhibited in the affidavit of the acting manager of the plaintiff bank which show debits of $192.17 at the end of February, $174.20 at the end of March and $184.58 at the end of April being interests charged, and payments into the account in April totalling $1,000, resulting in the debit balance of $18,023.84 as at the end of April, in which sum he asked for judgment for the plaintiff with interest thereon at the rates stated in the Statement of Claim. I allow the appeal and grant leave to the plaintiff to sign final judgment in the sum of $18,023.84 being balance due as on 30 April 1973, with interest thereon at the rate of 12% from 1 May 1973 to the date of this order and at the rate of 6% thereafter until date of realisation.

Appeal allowed.

Solicitors: *Yeap & Yeap; Gibb & Co.*

RE WAN KEE CHEONG, DECD.

[O.C.J. (Wan Hamzah J.) June 21, 1974]
[Ipoh — Probate Suite No. 1 of 1972]

Wills Ordinance, 1959, ss. 12 and 16 — Revocation of will by marriage — Revival of will — Whether material that testator knew that will had been revoked.

In this case the testator had made his will on August 8, 1952. He, subsequently married the third defendant. After the said marriage, he made codicils to the will and after making certain alterations in the legacies, he said, "In all other respects I confirm my said will". The question which arose was whether the will and the two codicils could be admitted to probate.

Held: in this case it was clear that the deceased intended that his will would be operative and it was immaterial whether he knew that the will had been revoked by his marriage. The will had been revived and probate should be granted in respect of the will and the two codicils.

PROBATE SUIT.

Philip Leong for the plaintiffs.

N. T. Rajah for the first defendant.

W. S. W. Davidson for the second and third defendants.

M. Sivalingam for the first intervener.

G. Moganasundram for the second intervener.

F. C. Arulanandom for the third intervener.

Wan Hamzah J.: There can be no doubt that the intention of the deceased, Wan Kee Cheong, after his marriage with the third defendant was that his Will dated 8 August 1952 should have effect subject to certain modifications because in the codicil of 15 October 1964 he referred to his Will "which Will bears the date *i.e.* 8th day of August 1952" and directed "... my Will shall be construed and have effect as if the names of the said Wan Seck Choon (f) and Wan Choi Koon (f) and Wan Kah Chan alias Wan Kar Chan had been inserted thereon throughout in the place of the name of the said Cheong Sau Yoong (f) deceased as Executors and Trustees." and stated "And in all other respects I confirm my Will...", and in the codicil of 28 March 1972 he referred to his Will "which Will bears dated August, 1952" and also stated "In all other respects I confirm my said Will."

On behalf of the first and third defendants it was contended that for the Will to be revived under section 16 of the Wills Ordinance 1959 after it has been revoked under section 12 by the deceased's remarriage, there must be intention on his part to revive it and there cannot be intention to revive unless he knew that the Will had been revoked by his marriage and there is no evidence to show that he knew of the revocation. It is contended it is not sufficient that there was intention that the Will should be operative but there must be intention to revive it. It was pointed out that there was no extrinsic evidence adduced to show surrounding circumstances from which intention to revive can be inferred. It was pointed out that most of the cases cited in support of revival were cases in which the testator had made two or more Wills the later revoking the earlier and therefore there was no question of the testator not knowing that the earlier Will had been revoked when he confirmed it. It was pointed out that in the books of forms and precedents the word "confirm" is used in the forms of codicils for altering, amending or varying a Will, but in the form of codicil for reviving a revoked Will other appropriate words are used, and in the present case the solicitors who had drawn the two codicils had not used the form of codicil appropriate for reviving a Will, thus showing that there was no intention of the testator to revive his Will.

In my opinion the words "intention to revive the same" in section 16(1) of the Wills Ordinance mean and include intention that the Will should have effect. In my opinion where a testator although ignorant of his Will having been revoked by his subsequent marriage, in a properly executed codicil confirms that Will, thereby showing that he intends that the Will shall have effect, this is sufficient to revive the Will under section 16. In my opinion in the present case it is not material whether the deceased knew his Will had been revoked. From the two codicils I find the deceased intended that his Will should be operative, and therefore I hold that the Will has been revived. To hold that the Will has not been revived would be to frustrate the clear intention of the deceased that his Will should be carried out.

As regards the question of fact in this case whether the deceased knew that his Will had been revoked by his subsequent marriage, I am inclined to infer from the facts in this case that the deceased had been so advised by the two solicitors who helped him to execute the respective codicils.

I find that the gifts in the two codicils are not inconsistent with one another and they can stand together. Although the codicil of 28 March 1972 is described therein as a first codicil, apparently this is a mere misdescription and there is nothing else to show intention that the codicil of 15 October 1964 should not have effect.

I therefore decree probate in respect of the Will and the two codicils.

Order accordingly.

Solicitors: *Cheang Lee & Ong; Maxwell, Kenion, Cowdy & Jones; Lewis & Co.; Lim Kean Chye & Co.; Yeoh Kian Teik & Co.; Arulanandom & Co.*